

12921 Transp-Cohen

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-196760

DATE: February 2, 1978

MATTER OF: U.S. Duracon Corporation

DIGEST:

1. [Protest against IFB's design specification which precluded protester from participating in project as subcontractor is denied where protester merely alleges that its product could meet IFB's performance specification.
2. Issuance of Letters of Acceptability by Tri-Service Committee to underground heating conduit suppliers was premature where record shows that not all tests necessary to establish compliance with Tri-Service specifications were completed.

DLG-3752

U.S. Duracon Corporation (USDC) protests the award by the Department of the Navy of a contract under invitation for bids (IFB) No. N62474-78-B-0157 for the construction of a training building at the Navy's Fleet Training Center in San Diego, California. USDC, a supplier of underground heat distribution conduit (piping), was a potential subcontractor for the project. The firm contends that (1) the Navy's design requirement that piping have a one-inch continuous annular air space between the outer surface of the insulation and the inner surface of the exterior casing precluded USDC from participation in the project, and (2) piping offered by other suppliers for use on the project erroneously was determined by the National Bureau of Standards (NBS) to meet the Government's insulation requirements.

DLG-1870

AGC-00061

DLG-03951

AGC-00126

The protest is denied in part and sustained in part.

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The record indicates that the acceptability of underground heat distribution conduit systems for United States military installations is determined by the Tri-Service Underground Heat Distribution Committee, which is comprised of representatives of the Departments of the Army, Navy and Air Force. A system's acceptability originally was judged on the basis of design and performance criteria and tests established in 1962 by NBS and adopted by the Tri-Service Committee in 1964. Those criteria and tests appear in a Tri-Service document entitled "Procedures for Establishing Acceptability of Underground Heat-Distribution Conduit Systems" (Procedures). A manufacturer whose product met the design and performance specifications was issued a Letter of Acceptability, which entitled the firm to supply its product in projects that involved such systems.

The record further shows that asbestos-based insulation originally was found acceptable, and Letters of Acceptability were issued on that basis. However, once it was discovered that asbestos contributed to certain health problems, the manufacturers began to use insulation with various asbestos substitutes. At the Tri-Service Committee's request, NBS tested the substitutes, and on June 1, 1979, reported that only Johns-Manville's THERMO-12 satisfied the tested criteria. The original Letters of Acceptability therefore were revoked, and interim letters were issued contingent on the use of that pipe insulation.

The only evidence to support USDC's first contention is the assertion that testing conducted for it by an independent laboratory shows that USDC's product meets the performance criteria necessary for a Letter of Acceptability. We considered an almost identical protest by USDC in our decision in U.S. Duracon Corporation, B-194225, B-194673, May 15, 1979, 79-1 CPD 356. We stated:

"We believe USDC's [assertion that the design requirement should be ignored because of the alleged

performance capabilities of its product] * * * is not reasonable, as it would, in effect, convert a clearly delineated design specification to a performance specification. In our view, that result could only be achieved by reading the letter of acceptability [requirement] * * * out of context, with the result that the design specification would be rendered essentially meaningless: See S. Livingston & Sons, Inc., B-193613, March 5, 1979, 79-1 CPD 147. We do not believe a meaningful argument can be made which even suggests that products which deviate from the design specification would be eligible for a letter of acceptability if these products passed the laboratory performance tests."

In this respect, our Office will not question an agency's determination of its minimum needs, or the technical judgment forming the basis for that determination, unless it is clearly shown to be unreasonable. Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126. That is particularly the case where the issue raised is a highly technical one, and the agency's judgment thus is based on expert technical opinion. METIS Corporation, 54 Comp. Gen. 612, 615 (1975), 75-1 CPD 44. Since the protester has the burden to affirmatively prove its case, Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337, and because USDC has not proffered any additional evidence on this issue, this portion of the protest must be denied.

USDC protests the acceptability of other firms' products on the basis that the testing performed by NES did not conform to the Tri-Service Procedures. USDC points out that although the

Procedures require a number of separate tests to determine the various properties of the insulation and whether they meet the established criteria, NBS conducted only one, the boiling test. Moreover, USDC disputes NBS's conclusion even on that test; USDC notes that the NBS report states that it found "cracks in the insulation that indicate that with continued boiling the insulation could break and fall off the pipe." In this connection, the Procedures provide that insulation will be rejected if the testing discloses "physical or chemical changes * * * which are likely to impair its function." Finally, USDC argues that testing by NBS at the Tri-Service Committee's request does not meet the Procedures' requirement that the manufacturer of the product submit to the Committee a report by an "independent testing laboratory."

In response, the Navy concedes that the only test performed by NBS was the boiling test, and argues that the "continued boiling" referred to in the NBS report by its terms involves performance "beyond the test parameters." Moreover, the Navy contends that no other tests of the insulation were necessary on the basis that all relevant insulation properties and their conformance to any prescribed criteria can be extrapolated from the boiling test results.

The fact remains that NBS did conclude that THERMO-12 "passed" the Tri-Service boiling test, and we are not in a position to review that expert conclusion in this highly technical area. See METIS Corporation, supra. In this respect, we find it irrelevant to the merits of the issue that the test was conducted by NBS rather than by an independent laboratory, although we recognize that the Procedures appear to contemplate that the burden and expense of the testing be borne by the manufacturer rather than the Government.

However, it does appear that the issuance of Letters of Acceptability based on the NBS tests

was premature. Notwithstanding the Navy's position that only the boiling test was necessary, USDC is correct that the test is only one of a number that clearly are required by the Procedures; we must presume that the other tests would not have been required had they been unnecessary. Moreover, the NBS test report itself does not support the Navy's view, since it specifically provides that (1) it is limited to the boiling test; (2) it includes only "preliminary test results on THERMO-12"; and (3) further testing is required at least to determine pipe heat transfer factors. Accordingly, the protest on this issue is sustained.

Nevertheless, in view of our position with respect to the first basis for protest we must conclude that USDC was not prejudiced by the issuance of the Letters of Acceptability, since the firm was not eligible for a subcontract award under the project in any event. However, by letter to the Tri-Service Committee we are recommending that the testing of THERMO-12 be completed in accordance with the Procedures.

Parenthetically, we note that the Navy has advised us that the Tri-Service Letter of Acceptability requirements are being phased out, and conclusive testing and evaluation of USDC's product with respect to both its design and performance properties can be anticipated for purposes of future procurements.


Deputy Comptroller General
of the United States